Supreme Court, U. S.
FILED
FEB 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1976
No. 76-910

EDWIN K. WILLIAMS & CO.—EAST, INC. and MARCOIN, INC.,

*Petitioners,*

*vs.*

EDWIN K. WILLIAMS & CO., INC., KEMP PRINTING CO. and MRS. E. K. WILLIAMS,

*Respondents.*

## REPLY BRIEF OF PETITIONERS.

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## REPLY BRIEF OF PETITIONERS.

### I.

### The Ninth Circuit Opinion Holds That Broad and Absolute Restraints Are Permissible in Any Service Industry.

This case squarely presents for this Court's consideration antitrust questions involving horizontal and vertical restraints in the service industries, which are particularly compelling matters for disposition in light of this Court's present consideration of the principles of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), in *GTE Sylvania Inc. v. Continental T.V., Inc.*, (No. 76-15).

Respondents' Brief in Opposition ("Br. Opp.") attempts to convey the impression the case turns on specific facts involving a limited series of restraints. (Br. Opp. pp. 10-11.) It does not.

The opinion below is a broad, unqualified holding. It accepts the fact that there were absolute prohibitions on petitioner East's competing with West outside East's assigned territory, or in any territory under any other tradename with regard to any product related to the retail petroleum business. 542 F.2d at 1061-62. (Pet. App. pp. 16-18.)[1] The Ninth Circuit also accepts as fact that East was a potential competitor, but was eliminated as such in 1952 and again in 1968 under the terms of the Revised Agreement. *Id.* Based on these facts, the Ninth Circuit concludes in less than two pages that *Schwinn* does not apply to service industries and that competitors may "exchange" their right to compete and allocate territories and customers through a tradename license. In short, however much respondents may now wish to embellish or restate the facts, their effort is irrelevant because the opinion below, which is the holding this Court must review, sets forth the facts the Ninth Circuit deemed relevant to its broad ruling.[2]

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[1]Respondents have previously conceded the breadth of the restraints (see Petition pp. 11-12; Pet. App. pp. 45-46), although they now attempt to minimize the impact of the restraints here by creating strawmen. Their discussion of the non-existence of internal territorial and customer restraints within East's territory is beside the point. (Br. Opp. p. 19.) Rather, it is the absolute intrabrand restraints *between* territories, and the absolute *inter*brand restraints both inside and outside East's territory that are at issue.

Similarly, petitioners are not quarreling with exclusive dealing cases, as is suggested by respondents at page 16 of their brief. This is not an exclusive dealing case.

[2]Respondents, for example, try hard to contradict the Ninth Circuit's conclusion that East was a potential competitor of West in the seminar business. They suggest that East's seminars were simply an extension of West's own seminars (Br. Opp. pp. 17-18), which is contrary to the court's opinion (*see* 542 F.2d at 1057, 1061; Pet. App. pp. 7-8, 17) and the terms of the Revised Agreement itself (Paragraph XII, reprinted at Resp. App. pp. 19-20). Paragraph XII-D provided that East would have to pay West a royalty if West's materials were used; West at trial expressly disavowed having any claim against East under this provision. Indeed, Paragraph XII exemplifies the absurdity of justifying the market division between the two companies under the rationale adopted by the Ninth Circuit.



II.

**Respondents' Distinction Between This Case and Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976), Is Inaccurate, but More Importantly, Illustrates the Need for a Decision of This Court on the Question of What Constitutes Permissible Vertical Restraints in Service Industries.**

Respondents' claim that the Fifth Circuit's decision in *Response of Carolina, Inc. v. Leasco Response, Inc., supra,* does not conflict with the opinion below because one case concerned computer time-sharing and the other concerned accounting and management services makes no sense. (Br. Opp. pp. 21-22.) Neither case decides that *Schwinn* is or is not applicable because of the particular *type* of service involved. Rather, the Ninth Circuit holds *Schwinn* inapplicable because a service industry is involved; the Fifth Circuit, on the other hand, applies *Schwinn* in a service industry context. The decisions cannot be reconciled.

III.

**The Issue of Foreclosure of Competition Was Raised Below.**

Respondents allege that petitioners have, for the first time, raised the issue of foreclosure of competition under the rule of *United States v. Standard Oil Co. of California,* 337 U.S. 293 (1949) ("Standard Stations"). (Br. Opp. p. 20.) To the contrary, the issue

was raised both in the district court in Defendants' Memorandum of Contentions of Fact and Law, pages 86-87, and in the Ninth Circuit in Defendants' Opening Brief on Appeal, pages 39-40.

Moreover, respondents misstate petitioners' reference to § 3 of the Clayton Act (which by its terms does not apply to services) and *Standard Stations*. Petitioners have argued only that an analysis similar to that employed in *Standard Stations* should have been applied here to test whether there was an actual restraint of trade that constituted a violation of § 1 of the Sherman Act. (Pet. Br. pp. 20-22.) Such an analysis was employed by the Third Circuit in *America Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1250-52 (1975), but ignored by the Ninth Circuit here.

February 4, 1977.

Respectfully submitted,

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